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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME JOSE AGUIRRE,

Defendant and Appellant.

2d Crim. No. B257906
(Super. Ct. No. 2014007687)
(Ventura County)

Jaime Jose Aguirre appeals a judgment following his conviction for battery causing serious bodily injury (Pen. Code, § 243, subd. (d)),¹ with a jury finding that he personally inflicted great bodily injury (§ 1192.7, subd. (c)(8)), and trespass (§ 602.5, subd. (b)). The trial court sentenced him to an aggregate state prison term of four years and issued an order that he not contact the victim. We conclude, among other things: 1) the trial court did not commit reversible error by preventing Aguirre from impeaching a witness with a 14-year-old misdemeanor conviction for elder abuse, but 2) the trial court erred by issuing a "no contact" order. We strike the no contact order. In all other respects, we affirm.

FACTS

In 2014, Robert Goldwater lived in a house with his fiancé Maria Schmithuber. Aguirre had been living in an SUV which he parked in the driveway of

¹ All statutory references are to the Penal Code.

that residence. Goldwater had given him permission to park the vehicle there "on a contingency basis, just to make some repairs on his vehicle."

Goldwater received complaints from neighbors and his landlord about the presence of this vehicle. He had asked Aguirre to move the vehicle on three or four occasions, but Aguirre did not comply. Goldwater and two other persons moved Aguirre's vehicle out of the driveway and onto the street. They made sure it "was parked perfectly legal up against the curb."

Goldwater testified Aguirre came to his house without his consent and began "punching [him] in the nose." Goldwater said, "I don't recall too much because after the third blow to the nose, I kind of lost conscious, and I ended up in the kitchen." After he fell to the floor, Aguirre "began kicking" him.

Schmithuber testified Aguirre "attacked" Goldwater. Aguirre "start[ed] yelling and beating on him." Schmithuber made a 911 call.

Ashley Atwood testified Aguirre went to Goldwater's house. "[Aguirre] walked through the front gate to the front door." Aguirre came back from the house. Atwood's father asked where Goldwater was. Aguirre said, "On the kitchen floor."

Matthew Kappen, a medical doctor working in the emergency room at the county hospital, testified he treated Goldwater for his injuries. Goldwater had "a swollen left side of his face," a "cut under his eye," and a "swollen nose." "[H]e was very sore on the left side of his chest and left upper flank, the upper part of his belly. . . . The CT scan of his head showed that he had bilateral nasal fractures, and the CT scan of his chest showed that he had rib fractures 8 through 11 on the left." Kappen testified these injuries were "consistent with assault, like being punched in the face and kicked in the ribs."

Police Officer Joseph Metz testified he went to the house. He said, "I saw the victim, Mr. Goldwater, lying on the kitchen of the house, blood all over the floor and blood all over his face."

In the defense case, Aguirre testified he did not punch Goldwater and he not go into his house. He stood at the gate outside the house. From a distance of 25 to 30

feet, he saw "[Goldwater] sitting on the floor" uninjured. He thought Goldwater had "passed out" because "he drinks."

The Motion In Limine

The People moved to prohibit the defense from impeaching Schmithuber with her 2000 misdemeanor conviction for elder abuse. (§ 368.) The motion was made on the ground that "this conviction occurred 14 years ago and is thus too remote in time to bear upon [Schmithuber's] veracity." The trial court granted the motion to exclude that impeachment evidence. It said the offense did not involve moral turpitude.

DISCUSSION

Abuse of Discretion in Barring Impeachment Evidence

Aguirre contends the trial court abused its discretion by not permitting him to impeach Schmithuber with her conviction for elder abuse.

A prior conviction that involves moral turpitude may be admissible to impeach a witness's testimony. (*People v. Feaster* (2002) 102 Cal.App.4th 1084, 1091; *People v. Chavez* (2000) 84 Cal.App.4th 25, 28-30 [trial court properly permitted impeachment of a witness with a prior misdemeanor conviction involving moral turpitude].) "Moral turpitude is defined as the '*general readiness to do evil*.'" (*Feaster*, at p. 1091.) To determine whether a prior conviction involved moral turpitude, courts have used the "'least adjudicated elements' test." (*Ibid.*) This "means that 'from the elements of the offense alone--without regard to the facts of the particular violation--one can reasonably infer the presence of moral turpitude.'" (*Ibid.*)

Section 368, in multiple subdivisions, prohibits crimes against elder and dependent adults. Among other things, it makes it a crime: 1) to willfully cause such persons to suffer injury, pain or mental suffering (§ 368, subd. (b)); 2) to commit "theft, embezzlement, forgery, or fraud" (*id.*, subd. (d)); and 3) to falsely imprison an elderly person "by the use of violence, menace, fraud or deceit" (*id.*, subd. (f)). Some of its provisions apply to abuse or neglect of the elderly "under circumstances or conditions likely to produce great bodily harm or death." (*Id.*, subd. (b)(1).) Some provisions do not

"require specific intent to injure." (*People v. Medlin* (2009) 178 Cal.App.4th 1092, 1102.)

Consequently, the elder abuse offense (§ 368) "may be applied to a wide range of abusive situations, including within its scope active, assaultive conduct, as well as passive forms of abuse, such as extreme neglect." (*People v. Heitzman* (1994) 9 Cal.4th 189, 197.) As a general rule, offenses that "can be violated by wholly passive conduct, free from any element of force, violence, threat, fraud, deceit, or stealth . . . do[] not necessarily imply a general readiness to do evil or any moral depravity." (*People v. Sanders* (1992) 10 Cal.App.4th 1268, 1274-1275.)

The Attorney General claims elder abuse does not involve moral turpitude based on the least adjudicated elements of that offense.

Aguirre contends the prosecutor essentially removed this issue from this case. We agree. In the People's motion in limine, they conceded that Schmithuber's 2000 misdemeanor conviction "is likely *a crime of moral turpitude as it involves theft . . .*" (Italics added.)

A witness may be impeached with a prior misdemeanor theft conviction. (*People v. Carter, supra*, 227 Cal.App.4th at pp. 329-330.) Theft necessarily places both honesty and moral turpitude in issue. Impeachment evidence may be admitted where it "reflects on honesty." (*People v. Clair* (1992) 2 Cal.4th 629, 654.) "'Past criminal conduct involving moral turpitude . . . has some logical bearing on the veracity of a witness in a criminal proceeding . . .'" (*Carter*, at p. 329.)

Nevertheless, Aguirre has not shown excluding this evidence constitutes reversible error. "[T]rial courts retain their discretion under Evidence Code section 352 to bar impeachment with such convictions when their probative value is substantially outweighed by their prejudicial effect." (*People v. Clair, supra*, 2 Cal.4th at p. 654.) The age of the conviction is a factor in determining whether it is too remote in time to be used for impeachment. (*Ibid.*)

This 2000 misdemeanor occurred 14 years before trial. A trial court may reasonably exclude a conviction of such age as being too remote. (*People v. Feaster*,

supra, 102 Cal.App.4th at p. 1094 [trial court could properly consider that the offense "was committed 12 years before appellant's trial" in deciding not to admit it].) Aguirre contends the court granted the People's motion based on its misunderstanding of the moral turpitude issue. He suggests the People's argument on appeal that the court could exclude the conviction based on remoteness is irrelevant as remoteness was not an issue.

But the sole ground for the People's motion in limine to exclude the conviction was their claim that it was "too remote in time to bear upon [Schmithuber's] veracity." At the hearing on the motion, Aguirre's trial counsel discussed the moral turpitude issue, but she made no argument on, and no challenge to, the People's claim that the conviction was too remote. The trial court was aware of this issue. In referring to this conviction, the court pointed out that "it's 14 years old." Because the defense made no opposition on this issue, Aguirre has not shown why the trial court could not have reasonably inferred that the People's claim that the conviction was too remote was uncontested. But even if Aguirre is correct, the result does not change.

Aguirre has not shown a reasonable likelihood of a different result had he been able to use the conviction as impeachment. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) Schmithuber was only one of the People's witnesses. The defense case was based on Aguirre's testimony, but the jury did not find him to be credible. The defense claimed Goldwater received his injuries as a result of a fall and not as a result of the battery. But the People introduced medical evidence to support their case. Kappen testified Goldwater's injuries were "consistent with assault, like being punched in the face and kicked in the ribs." He said these injuries were not consistent with the defense claim that Goldwater injured himself by falling and hitting his face on a "hard object." This evidence corroborated Goldwater's testimony and undermined the defense.

Jurors could reasonably find Atwood's testimony impeached Aguirre. Aguirre said he only stood at the gate outside the house. But Atwood saw him go past the gate to the front door. Her testimony corroborated Goldwater's testimony. In addition, Aguirre admitted that he could not "think of any reason why she would make up stories about [him]." Jurors could find Aguirre's blunt statement to Atwood's father to be

incriminating. Aguirre had a motive for the attack because he admitted he was "pretty mad" that Goldwater had moved his vehicle. Aguirre's testimony about Goldwater not appearing to be injured on the floor was refuted by a photograph of Goldwater's injuries which the prosecutor showed to Aguirre on cross-examination. It was also impeached by Metz who testified Goldwater was lying on the kitchen floor and there was "blood all over the floor and blood all over his face." Jurors also could reasonably infer Aguirre had given conflicting statements to the police which showed his consciousness of guilt. Metz testified Aguirre first told him "there was no altercation" with Goldwater. Aguirre later told Metz there was a "verbal argument."

The No Contact Order

Aguirre notes that a minute order reflects that the trial court issued an order prohibiting Aguirre from contacting Goldwater. He claims the minute order is unauthorized because the court did not make a no contact order. He is incorrect. At the sentencing hearing, the court told Aguirre, "You are to have no contact with Robert Goldwater."

Aguirre contends the trial court did not have authority to issue a no contact order. We agree. The Penal Code "empowers the trial court to make various orders to protect witnesses and victims 'upon a good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur.'" (*People v. Scott* (2012) 203 Cal.App.4th 1303, 1324-1325.) But such orders are "'operative only during the pendency of criminal proceedings and as prejudgment orders.'" (*Id.* at p. 1325.) An order "prohibiting all 'contact,'" as here, "exceeds the powers granted" to the court by statute. (*Ibid.*)

Aguirre notes that "[h]ere there was no evidence that after being charged [defendant] had threatened, or had tried to dissuade, any witness, or had tried to unlawfully interfere with the criminal proceedings." (*People v. Ponce* (2009) 173 Cal.App.4th 378, 384.) If the victim receives unwanted communications from the defendant, "then a further remedy may be sought under Code of Civil Procedure section

527.6. That at any rate *is the remedy* afforded by the Legislature." (*People v. Scott, supra*, 203 Cal.App.4th at p. 1326, italics added.)

The People suggest the trial court had inherent power to issue the order. But "[w]here the Legislature authorizes a specific variety of available procedures, the courts should use them and should normally refrain from exercising their inherent powers to invent alternatives." (*People v. Ponce, supra*, 173 Cal.App.4th at p. 384.)

DISPOSITION

The no contact order is stricken. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Gilbert A. Romero, Judge
Superior Court County of Ventura

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.